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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

WALTER E. CRAVEN,
Petitioner,

vs.

RICHARD L. CARMICAL,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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No. .....

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RICHARD L. CARMICAL,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner, Walter E. Craven, Warden of the California State Prison at Folsom, appellee below, respectfully petitions that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision of that Court entered on November 4, 1971, reversing and remanding the order of the United States District Court.

OPINIONS BELOW

The opinion of the Court of Appeals is appended hereto as Appendix A.[1] The opinion of the United States District

457 F.2d 582

1. The opinion was reported in the Advance Reports at ~~451 F. 2d 399~~. The index of the bound volume contains the notation "Withdrawn by Order of Court."

Court is reported, *Carmical v. Craven,* 314 F. Supp. 580 (N.D. Calif. 1970), and is appended hereto as Appendix B.

JURISDICTION

On November 4, 1971, the United States Court of Appeals for the Ninth Circuit reversed the order of the United States District Court for the Northern District of California denying Richard L. Carmical's petition for Writ of Habeas Corpus. Petitioner-appellee's petition for rehearing and suggestion for rehearing *en banc* was denied on May 11, 1972, two judges voting for a rehearing *en banc*. A copy of the order is appended hereto as Appendix C. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254(1).

QUESTIONS PRESENTED

1. Whether the doctrine of deliberate by-pass precludes a state prisoner from raising on federal habeas corpus an allegation of an unconstitutionally selected jury panel where he has not raised the issue in accordance with state procedures, where counsel at trial accepted the jury after voir dire, and where there is no allegation of unfairness in the trial.

2. Whether a case of unconstitutional jury selection is shown by allegations that a disproportionate number of blacks were excluded from the jury panel when the allegations also establish that the disproportion resulted from the application of an objective, if imperfect, standard and did not result from intentional or purposeful racial discrimination.

STATUTES INVOLVED

This case arises under the Federal Habeas Corpus Act, 28 U.S.C. sections 2241-2255, but does not directly bring any

section into question. Also involved are California Penal Code section 1060 and California Code of Civil Procedure section 198 reproduced in Appendix D.

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

Richard L. Carmical, the petitioner for Writ of Habeas Corpus in the District Court, appellant below, and respondent here, was convicted in the Alameda County court by jury verdict of violations of California Health and Safety Code section 11500 (possession of heroin) and Penal Code section 12021 (convicted felon in possession of firearm) and, on November 4, 1966, was sentenced to state prison for the term prescribed by law, the sentences to run concurrently.

Respondent appealed his conviction, which was affirmed on January 22, 1968, by the California Court of Appeal. *People v. Carmical,* 258 Cal.App.2d 103; 65 Cal. Rptr. 504 (1968). Petitions for rehearing in the Court of Appeal and for hearing in the California Supreme Court were denied on February 21, 1968, and March 20, 1968, respectively. At trial and on appeal, petitioner urged that his arrest, the seizure of the weapon, and the subsequent search and seizure of the heroin were unlawful. No challenge was made to the jury panel at trial or on appeal.[2]

Subsequently, Carmical filed petitions for Writ of Habeas Corpus in the state courts alleging that he was unconstitutionally convicted by a jury panel from which potential jurors had been unconstitutionally excluded. The petitions were denied without opinion.

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2. Carmical also argued on his state appeal that the amount of heroin was insufficient to sustain the conviction and that the court erred in re-reading testimony and instructions. These issues were not urged in subsequent federal court proceedings.

B. Proceedings in the Federal Courts.

On September 17, 1969, Carmical filed a petition for Writ of Habeas Corpus in the United States District Court for the Northern District of California alleging that his conviction was based on evidence seized in an illegal search and that potential jurors had been unconstitutionally excluded from the jury panel. The court issued its Order to Show Cause on January 22, 1970, a timely return was filed, and on March 20, 1970, a hearing was held at which counsel for Carmical and for the Warden appeared. Following the filing of supplemental memoranda, the court on July 9, 1970, filed its order denying the petition, finding that there was no purposeful discrimination on grounds of race in the selection of the jury panel and that the seizure of evidence was lawful. Carmical appealed to the Court of Appeals for the Ninth Circuit on the issue of the selection of the jury panel. On November 4, 1971, that court issued its opinion reversing the order of the District Court and remanding the case for further proceedings.

STATEMENT OF FACTS

The issues herein were framed and decided on the basis of the allegations of the petition and its exhibits filed in the District Court. Carmical filed as an exhibit and relied on the facts noted in the decision of an Alameda County Superior Court judge who in 1968 found the jury selection procedure unfair. *People v. Craig,* No. 41750. A copy is appended hereto as Appendix E. The state accepted the allegations as true for the purpose of testing their sufficiency to sustain Carmical's claim that the jury panel unconstitutionally excluded members of his race.

At the time of Carmical's trial in 1966, the County of Alameda used a "clear-thinking" test to select master jury panels from voter registration lists, in accordance with the

requirement of California Code of Civil Procedure section 198 that a juror be in "possession of his natural faculties and of ordinary intelligence and not decrepit." The test consisted of 25 multiple choice questions which had to be answered in ten minutes.[3] In order to qualify for the master jury panel, prospective jurors had to give correct answers to 21 of the questions, but were not told about the time limit.

For the purposes of the hearing on the issue in the *Craig* case, a special analysis of test results was made for areas of Oakland selected by defendant Craig's counsel, one an area of predominantly black and low income persons, the other one an area of predominantly white and middle or higher income persons. The analysis disclosed that in the former (West Oakland) area the failure rate was 81.5%, and in the latter (Montclair) area the failure rate was 14.5%. Testimony of a psychologist at this hearing indicated that the test, while giving the appearance of being an intelligence test, contained some items reflecting the cultural bias of the author; that it was too short to take into consideration the subcultures of a heterogeneous population; that the time allowed for taking the test was too short; that it was poor procedure not to inform those that were taking it that there was a time limit; and that the grade required forpassing the test was too high. See Appendix E at 27. In an affidavit filed with the District Court, this psychologist concluded that because it was "difficult" to come to the conclusion that such a high percentage of "non-white" persons are below the level of average in intelligence, the test must measure something else. Questions with a "cultural bias" such as numbers 20, 21 and 25 "could account" for this percentage. The psychologist stated that in his opinion, "the test was evidently made up without considering cultural differences between persons taking it with the apparent

3. A copy of the test is appended hereto as Appendix F.

result that an extraordinarily high percentage of non-white persons failed it."

The analysis made also revealed, as noted in the *Craig* opinion (Appendix E at 25) that in the categories of exclusions where conscious or even subsconscious bias could operate, substantially equal numbers from each area were excused. These persons were excluded during an initial screening process for reasons such as health, hardship or occupational exemption before the objective test was administered.

Thus, the "facts" stated in the petition and exhibits established that there was a disproportionate exclusion of low income blacks, that it was due to an objective test administered to all potential jurors, and that such disproportion was inadvertent, not purposeful.

REASONS FOR GRANTING THE WRIT

The Court of Appeals on this record erroneously decided two important constitutional questions, holding: (1) that the doctrine of deliberate by-pass does not apply to a defendant who fails to challenge the composition of the jury panel in the state proceedings and is fairly tried by a jury with which he is satisfied unless the record shows an affirmative waiver; and (2) that a prima facie case of unconstitutional selection of the jury panel is sufficiently established by alleging that disproportionate numbers of poor minority groups were excluded, despite further allegations showing that the exclusion was the result of an objective test and that there was no purposeful discrimination based on race.

The decision of the Court of Appeals incorrectly interprets the decisions of this Court in *Fay v. Noia*, 372 U.S. 391 (1963) and *Swain v. Alabama*, 380 U.S. 202 (1965) and is in conflict with the decision of another panel of the Court of Appeals which cited *Swain v. Alabama, supra*, for a con-

flicting proposition and apparently reached an opposite result on the by-pass issue. See, *Lattimore v. Craven,* 453 F.2d 1249 (9th Cir. 1972).[4] We also invite this Court's attention to *Donaldson v. California,* 404 U.S. 968 (1971) in which this Court denied certiorari to review a case upholding a selection procedure similar to that at issue here.

The ruling in this case could result in the retrial of every minority group defendant sentenced to state prison in Alameda County since 1957,[5] although the defendants were satisfied with their juries at the time of trial, there may have been any number of their minority group on the juries which convicted them, there was no unfairness or denial of due process in the trials, there was no purposeful discrimination practiced by Alameda County, and the use of the test at issue was discontinued in 1968. We submit that the ruling of the Court of Appeals is not required by the constitution, as interpreted by this Court, and that the potential effect of the court's ruling on final, fairly tried state criminal cases is unconscionable.

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4. In *Carmical,* the court states:

> "The object of the constitutional mandate is to produce master jury panels from which identifiable classes have not been systematically excluded. The object is neither to reward jury commissioners with good motives nor to punish those with bad intentions. When a jury selection system actually results in master jury panels from which identifiable classes are grossly excluded, the subjective intent of those who develop and enforce the system is immaterial." App. A at 5.

In *Lattimore,* in contrast, the court stated:

> "The absence of persons of a particular race on a jury panel is no indication of discrimination. To challenge a jury panel on the grounds of racial discrimination, there must be a purposeful discrimination proven by systematic exclusion of eligible jurors of the proscribed race or by unequal application of the law to such an intent, as to show intentional discrimination." 453 F.2d at 1251.

5. There were 1,161 defendants convicted in jury trials between February 1957 and April 1968; of these, 583 were sent to state prison. Although the race of those defendants is unknown, and a number of them have undoubtedly completed their terms, it is evident that retrials in the hundreds may be required by this opinion.

ARGUMENT

I. The Doctrine of Deliberate By-Pass Should Preclude a Defendant Convicted in a Fair Criminal Trial from Raising on Federal Habeas Corpus a Claim That the Jury Panel Was Unconstitutionally Selected Where the Issue Was Not Raised at the Appropriate Time in State Court Proceedings and the Jury Selected Was Accepted by Counsel.

At his trial in the Superior Court, petitioner did not challenge the composition of the jury panel on any grounds whatever, nor did he raise on appeal any issue concerning the jury. He was represented by competent counsel at all times.

Under California law, a challenge to the composition of the jury panel must be made before the panel is sworn. Calif. Pen. Code § 1060; *See, People v. Neal,* 271 Cal. App. 2d 826, 836-837; 77 Cal. Rptr. 56 (1969). The right to an impartial jury drawn from a cross section of the community has been long recognized. Petitioner was represented by counsel. Thus, petitioner failed to assert a known right in accord with reasonable state procedure and was apparently satisfied with the jury selected. *See* CT-7.

It is well established that a federal court may refuse to consider a constitutional claim on its merits when a deliberate by-pass is shown. *Fay v. Noia,* 372 U.S. 391, 438 (1963). The deliberate by-pass by counsel of a state procedural rule serving a legitimate state interest will preclude an accused from asserting his constitutional claim unless the circumstances are exceptional. *Henry v. Mississippi,* 379 U.S. 443 (1965). (Contemporaneous objection rule.)

In ruling against respondent on the question of deliberate by-pass the court below stated: "There is nothing in either the state court proceedings or the record below suggesting that Carmical's attorney declined to raise the issue for some strategic purpose." App. A at 1. We submit that this

conclusion overlooks the nature of the right at issue and the compelling state interest in the procedural rule involved.

The right at issue here is the right to challenge the composition of and the process for selecting the jury panel from which the jury to try the case is drawn. There are obviously two aspects to permitting such a challenge; one is the right of the defendant not to have members of his race purposefully excluded, the other is the right of members of the excluded group to serve on juries. We point out that the latter interest is not involved here; the test is no longer being used.

The defendant's right to have his race represented on the panel is fully served by requiring that the challenge be made before the jury is sworn. In any case of general disproportionate representation in the entire jury panel, it is obvious that any single panel may contain substantial numbers of the minority group. Conversely, even when general representation is proportionate any single panel might not contain any members of the minority group. Thus, counsel could reasonably conclude that no useful purpose *as far as his client was concerned* would be served by challenging the panel.

The court below, in holding that there was no strategic purpose evident for *failing* to raise the issue below, completely failed to consider that no strategic purpose, except delay, would be served by making such a challenge. Indeed, if substantial members of Negroes were on the panel, a challenge would risk getting a panel with fewer Negroes. Counsel's concern in any case is selecting a jury which he believes will give his client a fair trial. After examining and accepting a jury, counsel has affirmatively indicated his belief that his client can be fairly tried by it. If he does not so believe, his challenge should be made at the time, not held in reserve to be used if his client is convicted. Either

course of action, however, provides the strategic purpose for finding deliberate by-pass.[6]

Finally, we note that this Court has implicitly accepted the concept that failure to challenge the jury before trial precludes relief. In *Fay v. New York,* 332 U.S. 261, 266 (1947) in discussing a challenge to the "blue ribbon" jury, this Court notes that if the challenge was good, all convictions by special juries "would be set aside *if the question had been properly raised at or before trial.*" (Emphasis added.)

The right to challenge a jury is a particularly appropriate right to which to apply a rule that failure to properly raise the issue precludes subsequent relief without a showing of affirmative waiver, and a particularly inappropriate one to apply a rule that personal waiver is required. In this respect, it is analogous to the right to present witnesses for the defense, the right of the defendant to testify, or the right to cross-examine any witness. That these rights have been waived is implicit in the failure to exercise them. Moreover, the right to challenge the jury panel, while important, has no necessary effect on the fairness of the ensuing trial, and no effect on the validity of the fact finding process.

We submit that the acceptance of the jury should be a sufficient showing of an affirmative waiver of the right to challenge the panel without further inquiry into knowledge, reasons or trial strategy. Where neither defendant nor counsel expresses any dissatisfaction with the jury and there is no question that the trial was fair, no legitimate interest of the accused is protected by permitting collateral attack, and the legitimate, indeed compelling, interest of the state in the finality of fair convictions is destroyed.

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6. See *Henry v. Mississippi, supra,* at 451. Any right of the excluded group is equally fully served by requiring the challenge to be made at this point. Moreover, the excluded group may bring an action independent of any criminal case.

II. While a Showing of Disproportional Racial Representation May Suggest a Prima Facie Case, on the Further Showing That Such Disproportion Is Not Due to Purposeful Racial Discrimination, No Unconstitutional Selection Is Shown.

The allegations of the petitioner established that disproportionate numbers of minority and low income persons were excluded from the master jury panel; that the exclusion resulted from the use of a "clear thinking" test of 25 objective questions used to select juries of "ordinary" intelligence; and that the test did not accurately measure average intelligence and may have been culturally biased. The allegations also established, however, that there was *no purposeful discrimination based on race.*

The decisions of this Court involving jury selection have uniformly held that while mere disproportion may establish a *prima facie* case of racial discrimination it is only purposeful exclusion on grounds of race which is unconstitutional. See, e.g., *Swain v. Alabama,* 380 U.S. 202 (1965); *Eubanks v. Louisiana,* 356 U.S. 584 (1958).

The court below held, however, despite the uncontested showing that no purposeful discrimination took place and the disproportion was due to the application of an objective standard, that a prima facie case of unconstitutional discrimination was shown. The reasons for the court's holding were that the test did not measure "average intelligence," that it was culturally biased, and that purposeful discrimination is not a factor. The court noted that *Griggs v. Duke Power Company,* 401 U.S. 424 (1971), epitomizes a trend toward the proscription of devices that result in the exclusion of minority groups.[7] App. A at 7, N.3.

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7. *Griggs* involved the interpretation of a statute, and held invalid the use of intelligence tests which were not job related and resulted in the disqualification of disproportionate numbers of minority group job applicants. The purpose of the statute was to mitigate the effects of previous discrimination.

Whatever the trend of the decisions may be in other areas, this Court has always found purposeful discrimination the *sine qua non* of unconstitutional jury selection. That the test at issue here did not measure "average" intelligence and might have been "culturally biased" does not make it unconstitutional. In *Fay v. New York, supra,* at 291, the Court notes:

> "Even in the Negro cases, this Court has never undertaken to say that a want of proportional representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution."

In *Fay v. New York,* this Court considered the validity of New York special juries on charges that their use unfairly narrowed the choice of jurors. The criteria used in selecting the general panel from which the special juries were selected on the basis of further qualifications were: citizen; 21-70 years old; the owner or the spouse of the owner of property of value of $250.00; not convicted of felony or misdemeanors involving moral turpitude; intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly. *Fay* at 266-267.

This Court noted (at 291):

> "At most the proof shows lack of proportional representation and there is an utter deficiency of proof that this was the result of a purpose to discriminate against this group as such. The uncontradicted evidence is that no person was excluded because of his occupation or economic status. All were subjected to the same tests of intelligence, citizenship, and understanding of English. *The state's right to apply these tests is not open to doubt even though they disqualify, especially in the conditions that prevail in New York, a disproportionate number of manual workers.* A fair

> application of literacy, intelligence and other tests would hardly act with proportional equality on all walks of life." (Emphasis added.)

As in the instant case, the disproportion only raised the question of unlawful representation. Since it resulted from the application of an objective standard, it was constitutional.

In two recent cases, the Supreme Court has stated that a state may properly use tests of intelligence or education to select jurors. *Carter v. Jury Commission,* 396 U.S. 320 (1970); *Turner v. Fouche,* 396 U.S. 346 (1970). What it may not do is extend the right or duty of jury service to some of its citizens and deny it to others on racial grounds. *Carter, supra* at 330.

In *Carter* this Court considered the validity on its face of a statute which required the selection for jury service "those persons who are 'generally reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character, and sound judgment. . . ." *Carter* at 331. The Court declined to hold the statute invalid:

> "It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifications for their jurors. The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character. 'Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.'" *Carter* at 332-33 (Footnotes omitted).

This Court subsequently commented:

"The provision is devoid of any mention of race. Its antecedents are of ancient vintage, and there is no

suggestion that the law was originally adopted or subsequently carried forward for the purpose of fostering racial discrimination." (Footnotes omitted). *Carter* at 336.

In *Turner v. Fouche, supra,* the Court also declined to strike down similar provisions as invalid. However, in *Turner,* the record disclosed that of 178 potential jurors rejected by the jury commissioner "as not conforming to the statutory qualifications for juries either because of their being unintelligent or because of their not being upright citizens," 171 were Negroes. The court held that the district court should have responded to this fact and to the fact that 225 potential jurors (9% of the county population) who were unknown to the commissioner were excluded without further inquiry:

> "In sum, the appellants demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, *at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria.* The appellants thereby made out a prima facie case of jury discrimination, and the burden fell on the appellees to overcome it.
>
> "The testimony of the jury commissioners and the superior court judge that they included or excluded no one because of race did not suffice to overcome the appellants' prima facie case. So far the appellees have offered no explanation for the overwhelming percentage of Negroes disqualified as not 'upright' or 'intelligent,' nor for the failure to determine the eligibility of a substantial segment of the county's already registered voters. No explanation for this state of affairs appears in the record. The evidentiary void deprives the District Court's holding of support in the record as

presently constituted. 'If there is a 'vacuum' it is one which the State must fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination.' " (Footnotes omitted.) *Turner* at 360-61.

Applying the standards of these cases to the facts in the instant case, it is clear that there is no discrimination based on race. Here, in contrast to *Turner*, the facts disclose that the "disparity" in percentages occurred at the point in the process where completely *objective* criteria were used. At the point in the selection process where even unconscious bias could contribute to the result, proportionately equal numbers of jurors were excluded.

We note that any test of education or even "ordinary" intelligence is going to be culturally biased. One becomes educated by absorbing the wisdom and language of the prevailing culture. "Ordinary," too, may be interpreted as the prevailing level of intelligence and education among the general population and thus connotes cultural understanding. While the state may not exclude persons because of their race or economic status, it need not change its standards to insure proportional representation of any particular group.

Finally, standards used to insure that minority group members have equal opportunities for jobs have no necessary application to the problem of jury selection.[8] The reason for allowing challenges to the jury by the defendant is because he may well say that a community which discriminates against all Negroes discriminates against him. *See, Fay v. New York, supra* at 293. Where there is no pur-

8. If the rule on jury selection is to be changed, then it is an obvious rule for completely prospective operation. Trials under the old standard were completely fair and the validity of the fact-finding process is not affected. In contrast, the effect on the states would be catastrophic.

poseful discrimination, no such prejudice exists. Such is the case here. We submit that the court below has erroneously interpreted governing case law, and has reached a conclusion with a potentially devastating effect.

CONCLUSION

Because of the importance of the two questions involved, and the potential effect on the state's system of justice, we respectfully request that the Writ of Certiorari be granted.

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(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 26,236

Richard L. Carmical,
Petitioner-Appellant,

vs.

Walter E. Craven, Warden, California State Prison at Folsom,
Respondent-Appellee.

[November 4, 1971]

Appeal From the United States District Court
for the Northern District of California

Before: BARNES, HAMLEY, and HUFSTEDLER, Circuit Judges

HUFSTEDLER, Circuit Judge:

Appellant Carmical appeals from an order denying his petition for a writ of habeas corpus. His petition charged that his state court conviction was invalid because he was tried by a jury drawn from a jury panel unconstitutionally selected.

Before we discuss the merits of the petition, we dispose of appellee's contention that Carmical had waived his jury discrimination claim by his failure to raise the question at the time he was tried in the state court in November 1966. The state court record contains no indication of any affirmative act on Carmical's part evidencing his deliberate rejection of his constitutional guaranty. (*McNeil v. North Carolina* (4th Cir. 1966) 368 F.2d 313, 315.) There is nothing in either the state court proceedings or the record

below suggesting that Carmical's attorney declined to raise the issue for some strategic purpose. As the district court impliedly found, the ingredients for deliberate bypass specified in *Fay v. Noia* (1963) 372 U.S. 391 are lacking, and the issue is not foreclosed on collateral attack. (*Cobb v. Balkcom* (5th Cir. 1964) 339 F.2d 95; *cf. Fernandez v. Meier* (9th Cir. 1969) 408 F.2d 974.)

For the purpose of testing the sufficiency of Carmical's averments, prima facie, to sustain his claim for habeas relief, the appellee admitted the truth of the matters set forth in the petition and exhibits filed in support of it. The petition and the exhibits include the following facts: Carmical was tried and convicted for possessing heroin and for illegally possessing a firearm. At the time of his trial in Oakland, California, Oakland used a "clear thinking" test to select a master jury panel from the voter registration lists. The test purportedly winnowed voters of below "ordinary intelligence," leaving only those who satisfied California's statutory commandment that a juror be "[i]n possession of his natural faculties and of ordinary intelligence and not decrepit." (Cal. Civ. P. Code § 198 (2) (West 1954).) The test consisted of 25 multiple-choice questions which had to be answered in 10 minutes. Prospective jurors were not told about the time limit before they took the test. To qualify for the master jury panel, prospective jurors were required to give "correct" answers to at least 80 percent of the questions.[1]

The use of this test excluded a substantial majority of otherwise eligible minority and low income persons from

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1. "Correct" answers were those supplied by the manufacturer of the test. We use "correct" pejoratively because we cannot describe as "right" any of the choices given for some of the questions asked. Here are three simples from the test:

"4. Why is a man suprior to a productive machine?

1. A man has a sense of humor.
2. A man can think.
3. A machine requires repairs."

the master jury roll. In the second half of 1967, 81.5 percent of registered voters from predominantly black and low income areas of Alameda County who took the test failed to pass it. In contrast, only 14.5 percent of those eligible jurors from predominantly white areas taking the test failed to pass it. A total of 29 percent of all persons tested failed the examination. At the time of Carmical's prosecution in 1966, registered voters from predominantly white areas were nearly four times as likely to pass the test as were voters from black and low income areas.

A psychologist who is an expert on reliable testing methods declared by affidavit that: (1) the test contained many administrative flaws; (2) the high failure rate indicated that the test was excluding persons of ordinary intelligence; and (3) certain questions measured cultural rather than intelligence factors.

In 1968, the Superior Court for the County of Alameda prohibited further use of the test because it separated examinees on some basis other than "ordinary intelligence."[2]

The facts accepted as true for purposes of this appeal established a prima facie case of class exclusion from the jury selection process. In *Whitus v. Georgia* (1967) 385 U.S. 545, jurors were selected from tax digests previously maintained on a segregated basis. Blacks constituted 27.1 percent of persons potentially eligible for jury service. Only 9.1 percent of the grand jury venire and 7.8 percent of the

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"23. If a person asks you for something you do not have, you should:
1. Tell him to mind his own business.
2. Say you don't have it.
3. Walk away."

"25. If it rains when you are starting to go for the doctor, should you:
1. Stay at home.
2. Take an umbrella.
3. Wait until it stops raining."

2. People v. Craig (Super Ct. of Alameda County 1968) No. 41750.

petit jury venire were blacks. There was no evidence that any of the 27.1 percent eligible black jurors were disqualified from jury service. There existed a 3-to-1 disparity between blacks eligible for jury service and those on the grand jury venire and a 3.5-to-1 disparity on the petit jury venire. Ten out of 123 persons on both venires, or 8.1 percent, were blacks, a disparity of 3.3-to-1. Here, the test excluded from jury service 81.5 percent of the registered voters from black and low income neighborhoods, leaving 19.5 percent. The state offered no evidence that any voter disqualified by the test was disqualified for other reasons. The ratio of eligible black and low income persons to those placed on the master list was 4.2-to-1, a disparity greater than that condemned in *Whitus*.

Once Carmical has presented his prima facie case, the state must adduce evidence sufficient to rebut it. (*E.g., Coleman v. Alabama* (1967) 389 U.S. 22; *Hill v. Texas* (1942) 316 U.S. 400; *Norris v. Alabama* (1935) 294 U.S. 587.)

The sole issue on appeal is a narrow question of law: Is proof alone that the "clear thinking" test in fact resulted in large-scale exclusion of identifiable classes of veniremen otherwise eligible for jury service sufficient to make out a prima facie case of constitutionally impermissible jury selection, or, as the state contends, must Carmical also have offered evidence that the "clear thinking" test was intentionally designed to produce that result?

The narrowness of the question does not obscure its constitutional importance. Trial by jurors selected from the broad spectrum of society is a constitutional mandate. (*E.g., Carter v. Jury Commission* (1970) 396 U.S. 320, 330; *Smith v. Texas* (1940) 311 U.S. 128, 130.) A state may not systematically exclude persons from the jury selection process on the basis of their race, color, national origin, or on other identifiable group characteristics. (*E.g., Whitus*

v. Georgia, supra; Hernandez v. Texas (1954) 347 U.S. 475; *Strauder v. West Virginia* (1879) 100 U.S. 303.) Token inclusion of members of the affected class in the selection process does not satisfy that fundamental command. (*See Jones v. Georgia* (1967) 389 U.S. 24; *Whitus v. Georgia, supra; Smith v. Texas, supra.*) Although petitioner is not constitutionally required to be tried by a jury including persons from his race or class or by a jury proportionately representative of the community (*e.g., Swain v. Alabama* (1965) 380 U.S. 202, 208; *Thomas v. Texas* (1909) 212 U.S. 278), he is entitled to a jury selected from a master list drawn from the community as a whole.

It is true that almost all of the cases that have come before the Supreme Court challenging the constitutionality of jury selection systems have been cases in which the methods of selection were explicitly or implicitly designed to exclude Negroes from jury service. (*E.g., Whitus v. Georgia, supra* [segregated tax returns]; *Eubanks v. Louisiana* (1958) 356 U.S. 584 [judges interviewed prospective jurors]; *Avery v. Georgia* (1953) 345 U.S. 559 [segregated jury tickets]; *Hill v. Texas, supra* [jury commissioners failed to search out qualified blacks]; *Smith v. Texas, supra* [blacks placed last on jury list]; *Bush v. Kentucky* (1882) 107 U.S. 110 [blacks excluded by law]; *Neal v. Delaware* (1880) 103 U.S. 370 [blacks presumed incompetent to serve as jurors].) The opinions take into account the historical prevalence of intentional discrimination against Negroes, but the Court has never implied that the absence of that factor destroys a prima facie case. Rather, the Court has charged state officials with an affirmative duty to seek, and include within the jury selection process, all persons qualified under state law. As the Court stated in *Avery v. Georgia, supra,* 345 U.S. at 561:

> "The Jury Commissioners, and the other officials responsible for the selection of this panel, were under

> a constitutional duty to follow a procedure—'a course of conduct'—which would not 'operate to discriminate in the selection of jurors on racial grounds.' *Hill v. Texas,* 316 U.S. 400, 404 (1942). If they failed in that duty, then this conviction must be reversed—no matter how strong the evidence of petitioner's guilt. That is the law established by decisions of this Court spanning more than seventy years of interpretation of the meaning of 'equal protection.'"

(*Accord, Eubanks v. Louisiana, supra,* 356 U.S. at 587, *quoting from Patton v. Mississippi* (1947) 332 U.S. 463, 469; *Cassell v. Texas* (1950) 339 U.S. 282, 289.)

To support its argument that the Constitution does not forbid a system of jury selection that substantially excludes identifiable classes of prospective jurors, but only forbids systems deliberately designed to accomplish that result, the state relies on a passage from *Swain v. Alabama, supra,* 380 U.S. at 209:

> "Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race."

Swain will not carry the burden the state puts upon it.

The object of the constitutional mandate is to produce master jury panels from which identifiable community classes have not been systematically excluded. The object is neither to reward jury commissioners with good motives nor to punish those with bad intentions. When a jury selection system actually results in master jury panels from which identifiable classes are grossly excluded, the subjective intent of those who develop and enforce the system is immaterial. For example, in *Norris v. Alabama, supra,* 294 U.S. at 598, the Court related testimony by jury officials that they had not considered race or color in preparing the jury roll. The Court then observed:

> "If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision —adopted with special reference to their protection— would be but a vain and illusory requirement."

(*Accord, Turner v. Fouche* (1970) 396 U.S. 346, 361; *Sims v. Georgia* (1967) 389 U.S. 404, 407-08; *Hernandez v. Texas, supra,* 347 U.S. at 481-82; *Smith v. Texas, supra,* 311 U.S. at 131-32.) The lack of specific intent to discriminate on the part of Alameda County's jury officials cannot offset the grossly discriminatory effect of their jury selection process. (*Cf. Griggs v. Duke Power Co.* (1971) 401 U.S. 424;[3] *Gaston County v. United States* (1969) 395 U.S. 285; *Gomillion v. Lightfoot* (1960) 364 U.S. 339.)

However, proof of deliberate intent to discriminate may be relevant when, as in *Swain,* the percentage of excluded classes is not gross enough unequivocally to establish discrimination. Evidence that the system was designed to discriminate invidiously may add enough strength to such statistical data to make out a prima facie case. In short, subjective intent may be relevant to prove that a particu-

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3. In *Griggs* the Court struck down the use of a seemingly objective test that resulted in inadvertent discrimination, holding that Title VII of the Civil Rights Act of 1964 proscribed the use of a standardized intelligence test that was not job related and operated to disqualify a disproportionate number of black job applicants. There was no evidence that the test was adopted for a discriminatory purpose. Although the Act appeared to sanction testing methods that were not used to discriminate, the Court found from the legislative history that Congress intended to proscribe unintentional as well as intentional discriminatory hirings.

Griggs epitomizes a clearly discernible trend toward the proscription of devices that result in the disproportionate exclusion of minority groups. (*See* Gaston County v. United States (1969) 395 U.S. 285; Labat v. Bennett (5th Cir. 1966) 365 F.2d 698, 719-20, *cert. denied* (1967) 386 U.S. 991.)

In *Griggs,* as well as here, the test was not related to the purpose for which it was administered. The examiners' good faith was not questioned. The resulting discrimination was conclusive.

lar system is invidiously discriminatory, but that evidence is not an element of the constitutional test.

The Fifth Circuit has squarely held that purposefulness is not an element of a prima facie case. After discussing a number of Supreme Court cases in *United States ex rel. Seals v. Wiman* (5th Cir. 1962) 304 F.2d 53, 65, *cert. denied* (1963) 372 U.S. 924, the court concluded:

> "Those same cases, however, and others, recognize a positive, affirmative duty on the part of the jury commissioners and other state officials, and show that it is not necessary to go so far as to establish ill will, evil motive, or absence of good faith, but that objective results are largely to be relied on in the application of the constitutional test."

In *Mobley v. United States* (5th Cir. 1967) 379 F.2d 768, 772, the court stated:

> "There is, therefore, an affirmative duty imposed by the Constitution and laws of the United States upon the jury selection officials . . . to know the availability of potentially qualified persons within significant elements of the community, including those which have been the object of state discrimination, to develop and use a system that will result in a fair cross section of qualified persons in the community being placed on the jury rolls and to follow a procedure which will not operate to discriminate in the selection of jurors on racial grounds."

(*Accord, Salary v. Wilson* (5th Cir. 1969) 415 F.2d 467, 472; *Vanleeward v. Rutledge* (5th Cir. 1966) 369 F.2d 584, 586-87.)

The state asserts that Alameda County's system operated fairly. The Supreme Court approved the use of intelligence or education as a criterion for jury service in *Carter v. Jury Commission* (1970) 396 U.S. 320 and *Turner v. Fouch* (1970) 396 U.S. 346. The state says that the jury commissioner utilized the purely objective and proper

standard of intelligence as indicated by the test results in preparing the master jury list and that that standard did not measure race or minority status and could not result in discrimination.

The state's argument ignores the record. For the purpose of the district court's ruling and upon this appeal, the state assumed the truth of the contents of the complaint and the accompanying affidavits. The state has thus conceded that the test did not measure average intelligence for the purpose of posing the legal issue.

In *Turner v. Fouche, supra,* the Court expressly disapproved the elimination of 171 blacks on the ground that they were not intelligent or upright. Although intelligence was a valid requirement for jury service, the mere assertion that a large number of blacks were not intelligent did not justify their exclusion. Because Alameda County's test did not measure intelligence, any reliance on test results is no more than an unsupported assertion that those persons excluded were not intelligent. We perceive no meaningful distinction between *Turner* and this case.

Moreover, the state has also assumed at this juncture that the test reflected cultural bias. The use of a test that was culturally biased and that resulted in the substantial exclusion of those classes against whom the bias existed is itself prima facie proof that the selection process violated the Fourteenth Amendment. "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race" or other identifiable minority characteristics. (*Cassell v. Texas, supra,* 339 U.S. at 287.)

The order is reversed and the cause is remanded for further proceedings consistent with the views herein expressed. Upon remand, the state shall have the opportunity to disprove each of the averments that it has conceded for the purpose of the prior district court ruling and for the purpose of this appeal.

Appendix B

In the United States District Court
for the Northern District of California

No. 52246

Filed—Jul 9 1970
C. C. Evensen, Clerk

Richard L. Carmical,
Petitioner,

vs.

Walter E. Craven, Warden,
California State Prison at Folsom,
Respondent.

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OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

GERALD S. LEVIN, District Judge

Petitioner was convicted and sentenced on November 4, 1966, by the Superior Court in Alameda County, California, for violations of California Health & Safety Code § 11500 (possession of heroin) and California Penal Code § 12021 (convicted felon in possession of a firearm). He petitioned this Court for a writ of habeas corpus and on January 22, 1970, this Court issued an Order to Show Cause. Petitioner bases his petition upon two grounds: *First,* that the "clear thinking" test used in the screening of prospective jurors at the time of petitioner's trial "was a gross discrimination along racial, economic and cultural grounds," and *Second,* that the evidence used to convict petitioner was obtained as a result of an illegal search and seizure made in the course of an arrest, which arrest was unlawful because of lack of probable cause for the arrest.[1]

The Test Used to Screen Prospective Jurors

At the time of petitioner's trial in 1966, a clear thinking test was used to select a master jury panel from the voter registration lists. This test consisted of twenty-five multiple-choice questions which had to be answered in ten minutes. In order to qualify for the master jury panel prospective jurors were required to give correct answers to at least 80 per cent of the questions.

The jury for petitioner's trial was drawn from this master jury panel. Petitioner, a Negro, claims that this clear thinking test excluded a disproportionate number of

1. Although the court is cognizant of its obligation to make an independent determination of this ground, the court notes that this contention was passed upon by the California Court of Appeal and found to be without merit. *People v. Carmical,* 258 Cal.App.2d 103, 65 Cal.Rptr. 504 (1968); hearing denied by the California Supreme Court March 20, 1968.

Negroes and low income persons. In *People v. Craig*,[2] adjudicated subsequent to the trial of petitioner, the Court considered this test as used to screen prospective jurors and found that it excluded a disproportionate number of Negroes and persons of low economic income. The expert testifying in that case expressed the opinion that the test had a tendency to exclude people from the ghettoes because of "inadvertent discrimination." The Court did not hold this test to be unconstitutional or unfair but merely directed the Jury Commissioner to summon a panel of jurors "in a manner consistent with this decision."

Assuming that this test excluded proportionately more Negroes and more persons of low economic income as compared to persons in middle or upper income classes, there is no evidence or showing that there was any purpose to exclude a disproportionate number of Negroes or low income persons. Furthermore, this test was administered equally to all persons regardless of race or income.

In *Swain v. Alabama*, 380 U.S. 202 (1965), the Court affirmed petitioner's conviction despite his allegation of racial discrimination in the selection of jurors. While Negroes constituted 26% of the males over 21 in that county, only 10% to 15% of the grand and petit jury panels were Negroes. Alabama law required the jury commissioners to place on the jury roll all male citizens in the community over 21 who are reputed to be honest, intelligent men and are esteemed for their integrity, good character and sound judgment. The Court found that in practice the commissioners do not place on the jury roll all such citizens,

2. The Court found in *People v. Craig* (Alameda County Superior Court, No. 41750, April 18, 1968) that 81.5% of the registered voters of West Oakland, who are predominantly black and of low economic income, failed the test while only 14.5% of the registered voters of Montclair, who are predominantly white and of middle or higher economic income, failed the test.

either white or Negro. The Court referred to this jury selection procedure and held (pp. 208-209):

> Venires drawn from the jury box made up in this manner unquestionably contained a smaller proportion of the Negro community than of the white community. But a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn.... There is no evidence that the commissioners applied different standards of qualifications to the Negro community than they did to the white community.... Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race.

Accord: *Akins v. Texas,* 325 U.S. 398 (1945); and *Thomas v. Texas,* 212 U.S. 278 (1909).

The decision in *Swain* fairly controls the contentions here. Petitioner does not have a constitutional right to have a proportionate number of his race or economic class on the jury or the master jury panel. *Swain, supra* at p. 208. The test given to Negroes was exactly the same as that given to others and it was administered and graded on equal terms with respect to all persons. Although this test may have been imperfect and resulted in excluding a disproportionate number of Negroes and persons of low economic income, this does not amount to purposeful discrimination based on race or income.

Objective criteria were used to select the members of the jury panel. The criteria were designed to test the intelligence of the prospective jurors. The Supreme Court of the United States recently has given approval of such a test. *Carter v. Jury Commission,* 396 U.S. 320 (1969); *Turner v.*

United States, 396 U.S. 398 (1969). In *Carter* the District Court refused to invalidate the Alabama law requiring the jury commissioners to select for jury service those persons who are "generally reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character and sound judgment. . . ." In affirming the judgment of the District Court, the Supreme Court said (pp. 332-333):

> It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifications for their jurors. The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character. "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty."

Turner follows *Carter* in upholding the constitutionality of the jury selection law which gives the jury commissioners the right to eliminate from grand-jury service anyone they find not "upright" and "intelligent." The distinguishing feature of *Turner* vis-a-vis the instant case is contained in the opinion of the court as follows (pp. 360-361):

> In sum, the appellants demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. The appellants thereby made out a prima facie case of jury discrimination, and the burden fell on the appellees to overcome it.

> The testimony of the jury commissioners and the superior court judge that they included or excluded no one because of race did not suffice to overcome the appellants' prima facie case. So far the appellees have offered no explanation for the overwhelming percentage of Negroes disqualified as not "upright" or "intelligent," or for the failure to determine the eligibility of a substantial segment of the county's already registered voters.

There is no showing in the instant case of purposeful exclusion from jury service because of race. Negroes of low economic income were treated in the same manner as whites and members of other minority groups who are persons of low economic income. Even though the use of the clear thinking test may have resulted in a high proportion of persons of petitioner's racial and social background failing the test, that is not adequate proof that persons of petitioner's or any other race were purposefully excluded from the master jury panel in Alameda County because of the employment of the test, and it is not sufficient to demonstrate a violation of petitioner's constitutional rights.

Petitioner's Arrest and the Search and Seizure

Petitioner alleges that police officers searched him in the course of an arrest which was unlawful because there was no probable cause to make an arrest. The following facts are either admitted or not controverted by petitioner.

Officer Alves and Agent Woishnis were aware of the fact that petitioner had been arrested on previous occasions for using narcotics, that he had been under an investigation since 1964, and that he had been convicted of a felony in 1957. Officer Alves received a call at 2:30 P.M. on January 7, 1966, from an anonymous caller who told him that petitioner was known as "Black Richard" and that he was parked in front of 1007-45th Street in Emeryville with "more nar-

cotics than he [could] swallow." The agent and officer proceeded immediately to the area in two cars.

After they had "staked-out" 1007-45th Street for two hours, petitioner came out and walked toward a 1957 Cadillac sedan parked in front. Agent Woishnis had previously observed petitioner in that vehicle. Petitioner opened the car door and sat behind the wheel with the door ajar. He then stepped out of the car and looked over the top toward two other persons coming from the porch. Agent Woishnis, communicating by radio, told Officer Alves that they should now go and talk with petitioner. Agent Woishnis drove his car and slowed it down for a stop as it passed petitioner. As the car was slowing for a stop Agent Woishnis observed petitioner pulling what appeared to be a pistol in a holster from his waistband. Agent Woishnis immediately jumped from his car and ran toward petitioner, and as he did he saw petitioner put the pistol on the car seat.

Meanwhile, Officer Alves had parked his car and was walking toward petitioner who was standing beside his car talking with the persons on the porch. When Officer Alves was about ten feet away, petitioner brought into view his right hand holding an object which appeared to be a pistol and a holster. Petitioner then made a movement as if to throw something into the car.

Agent Woishnis placed petitioner under arrest and immediately "patted him down." In the left front pocket of petitioner's trousers Agent Woishnis found a balloon containing a powder which he believed to be heroin and that is what it subsequently turned out to be. Officer Alves took the loaded pistol and holster from the car.

At the trial Agent Verbrugge testified that about a month prior to this arrest he conversed with petitioner concerning a sale of heroin by petitioner.

A police officer may in appropriate circumstances and manner approach a person for purposes of investigating suspected criminal behavior even though there is no probable cause to make an arrest. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Lowe v. United States*, 407 F.2d 1391, 1394 (9th Cir. 1969). The actions by Agent Woishnis and Officer Alves in approaching petitioner in order to talk with him about possible criminal behavior were lawful.

An arrest by officers can be supported by their reasonable cause to believe that a felony was being committed in their presence. *Rios v. United States*, 364 U.S. 253, 262 (1960); *Morales v. United States*, 344 F.2d 846 (9th Cir. 1965). In the present case petitioner was not arrested until the officers had seen him place a pistol on the seat of his car. This together with their knowledge that he had been convicted of a felony was sufficient to justify the officers' belief that a felony was being committed in their presence.[3] Consequently, the arrest of petitioner was lawful.

The search of petitioner's person was lawful because it was "incident to a lawful arrest." *Harris v. United States*, 331 U.S. 145 (1947); *United States v. Rabinowitz*, 339 U.S. 56 (1950). The Court is of the opinion that *Chimel v. California*, 395 U.S. 752 (1969) is not applicable here,[4] but even if it were, the search of petitioner would be lawful because it was in an area "within his immediate control" as defined by that case.

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3. Cal.Pen.Code § 12021 provides in part as follows:
Any person who is not a citizen of the United States and any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country . . . is guilty of a public offense. . . .

4. The rule of *Chimel* does not apply to searches conducted before June 23, 1968, the date of the *Chimel* decision. *Heffley v. Hocker*, 420 F.2d 881 (9th Cir. 1969); *William v. United States*, 418 F.2d 159 (9th Cir. 1969).

After arresting petitioner the officers seized the pistol from the seat of the car and in the trunk of the car they found a raincoat with a balloon containing milk sugar in one of the pockets. The warrantless search and seizure of this evidence is lawful under the circumstances because there was probable cause and because the car could have been removed quickly from the locality or jurisdiction in which the warrant would have been sought, or the evidence could have been removed from the car and destroyed or concealed. *Carroll v. United States,* 267 U.S. 132, 153 (1925); *Brinegar v. United States,* 338 U.S. 160 (1949); *Call v. United States,* 417 F.2d 462, 465-466 (9th Cir. 1969); and *Travis v. United States,* 362 F.2d 477 (9th Cir. 1966).

Accordingly, it is hereby ordered as follows: the petition for a writ of habeas corpus is denied; the order to show cause is discharged and the proceeding is dismissed.

Dated: Jul 9 1970

/s/ GERALD S. LEVIN
United States District Judge

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 26,236

Filed—May 10 1972,
Clerk

Richard L. Carmical,
Petitioner-Appellant,

vs.

Walter E. Craven, Warden,
California State Prison at Folsom,
Respondent-Appellee.

ORDER

Before: BARNES, HAMLEY and HUFSTEDLER,
Circuit Judges

All members of the court in active service, together with the two senior judges who served on the original panel, have considered the suggestion of a rehearing en banc. A majority of said judges have voted against a rehearing en banc. The votes of Chief Judge Chambers and of Judge Wright in favor of rehearing en banc are recorded.

The petition for a rehearing is denied. The suggestion of a rehearing en banc is rejected.

Appendix D

PENAL CODE SECTION 1060

Time for challenge to panel; method of making

WHEN AND HOW TAKEN. A challenge to the panel must be taken before a juror is sworn, and must be in writing or be noted by the Phonographic Reporter, and must plainly and distinctly state the facts constituting the ground of challenge.

CODE OF CIVIL PROCEDURE SECTION 198

Competency

A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years who shall have been a resident of the state and of the county or city and county for one year immediately before being selected and returned;

2. In possession of his natural faculties and of ordinary intelligence and not decrepit;

3. Possessed of sufficient knowledge of the English language.

Appendix E

In the Superior Court of the State of California
In and for the County of Alameda

BEFORE THE HONORABLE
SPURGEON AVAKIAN, JUDGE

Filed—Apr 18 1968
Jack G. Blue, County Clerk
T. J. Chamberlin
Deputy

DEPARTMENT NO. 6

No. 41750

The People of the State of California,
Plaintiff,

vs.

Mark Twain Craig,
Defendant.

MEMORANDUM DECISION ON CHALLENGE TO JURY PANEL

By a timely challenge to the jury panel drawn for the trial of his case, Defendant questions the whole process by which trial jurors are selected in Alameda County. Four days of testimony were devoted to developing the factual basis for the challenge.

The grounds of challenge consist essentially of the following:

1. The jury selection process results in the disproportionate exclusion of identificable groups (specifically, racial minorities and lower income citizens) and consequently produces a master panel which is not

representative of the community at large, in violation of the due process and equal protection clauses of the Fourteenth Amendment;

2. The jury selection process departs from the legislative pattern by eliminating persons who possess "ordinary intelligence," particularly by use of a written test which is not geared directly to the measurement of "ordinary intelligence";

3. The Jury Commissioner grants excuses from jury service under oral instructions instead of under written rules adopted by the Court under C.C.P. section 201a.

The master panel of trial jurors is compiled by the Jury Commissioner for half-year periods at a time. The current master panel was processed during the second half of 1967. Initially, 6,336 names were selected at random from the list of registered voters of the county. The selection was by a formula designed to provide an equal number of men and women, and a number from every precinct in the county substantially proportionate to the number of voters registered in such precinct. Notices were then sent to these persons to report at stated times for interview and inquiry into qualifications. Such contact was actually made with 5,079 of the total group. The remaining 1,257 are accounted for as follows:

Letters returned by Post Office	608
Failure to Respond to Notice	175
Deceased	79
Moved out of County	395
	1,257

From the 5,079 who were actually processed by the Jury Commissioner, 1,659 were found to be qualified and not excused. Service of 113 of these was deferred, at their request, to a later period, and 1,546 were certified to, and approved

by, the Court as the master panel for jury trials during the first half of 1968. The men numbered 790, and the women, 756.

With respect to the number who were processed but either excused or found not qualified, the total of 3,420 is made up of the following groupings:

Poor health	704
Occupational exemption	542
Women with small children	454
Lack of understanding of English	112
Prior jury service	244
Poor hearing	125
Business and personal hardship	161
Travel	17
Conviction of high crime	68
Lack of transportation	34
Mental instability	19
Failed written test	940
	3,420

As indicated below, the main thrust of the contention that the master panel is not a fair cross-section of the population of the county is aimed at the written test. There is no indication in the record of any racial or socio-economic discrimination by the Jury Commissioner's office in the other categories of elimination listed above.

The statutory qualification for jury service, insofar as the validity of the written test is concerned, is that jurors be "of ordinary intelligence" and "possessed of sufficient knowledge of the English language." C.C.P. 198. No definition of those terms is set forth in the statute, but the decisional law requires non-discriminatory selection from a broad base of the community and forbids a so-called "blue ribbon" approach. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946). The use of written tests in applying this standard is neither uniform nor unusual in this state.

In Alameda County, the test currently in use was adopted by the Court in 1956, after having been prepared by a psychologist for this particular use. It consists of 25 multiple choice questions. To pass, the juror must have at least 21 correct answers (84%) in ten minutes. Prior to taking the test, the juror fills out a questionnaire-affidavit consisting of fourteen items. This covers such things as length of residence, family status, education, employment, health, prior jury service, criminal record, any confinement in a mental institution, and willingness to serve as a juror (or reasons, if unwilling). This affidavit is reviewed by a staff member in the Jury Commissioner's office. If grounds for exemption or disqualification are clearly present, no further processing occurs; as to the others, the written test is administered, and a pass or fail grade is assigned. Some who pass the test are then referred to the Jury Commissioner or the Presiding Judge for final decision on close questions of whether a request for excuse or exemption should be granted or a ground for disqualification exists.

The statistical record in the Jury Commissioner's office does not show how many people took the test, because no list is compiled of those who passed the test but were later eliminated for other reasons.

However, for purposes of this case, a special analysis was made by the Jury Commissioner of two areas designated by Defendant's attorney. One area consists of 24 contiguous precincts in West Oakland with a total voter registration of 10,862. The other consists of 27 contiguous precincts in the Montclair section of Oakland with a total voter registration of 11,070.

The residents of the West Oakland area are predominantly black and of low economic income. The residents of

Montclair are predominantly white and of middle or higher economic income.

	West Oakland Area		Montclair Area	
Number of Registered Voters	10,862		11,070	
Number drawn from Voter Registers	133		145	
Non-responses, deaths, moved, etc.	39		23	
Number processed	94		122	
Excused without test	40	(42.5%)	53	(43.3%)
Took written test	54		69	
Failed test*	44	(81.5%)	10	(14.5%)
Passed test	10		59	
Excused after passing test	1		7	
Qualified	9		52	
Service deferred	1		2	
Certified to current panel	8		50	

*For the two areas combined, 123 took the test and 54 persons, or 44%, failed it.

It should be noted that in the categories in which conscious or even sub-conscious bias could operate—namely, the excuses by the interviewers without administering the test—a substantially equal percentage was excused from each area. And, as already stated, Defendant disclaims any contention that there has been any intent to discriminate on the part of either the Court or the Jury Commissioner's office.

We come, then, to the test, a copy of which is attached hereto. Why do 14.5% of the Montclair registered voters fail it, and why is the failure rate 81.5% in West Oakland?

A consideration of the test raises a number of questions:

(1) To what extent does it measure moral and social attitudes and level of education rather than mental capacity?

(2) Does it contain cultural, educational or environmental biases which are not present equally in high and low income groups and in different racial groupings?

(3) Is it sufficiently comprehensive to test intelligence?

(4) Is the pass-fail cutting point placed so high as to eliminate substantial numbers of people who do possess "ordinary intelligence"?

Ten questions in the test (Nos. 2, 5, 6, 7, 14, 15, 18, 19, 22, 24) appear to relate primarily to vocabulary or word recognition. Nine are answered as much or more on the basis of personal temperament and attitude or social, political or moral philosophy as on the basis of intelligence (Nos. 4, 8, 9, 10, 11, 14, 20, 23, 25). One (No. 19) calls for knowledge of the law (and, incidentally, has a legally incorrect statement listed on the score sheet as the correct answer).

Only a few questions call primarily for the application of reasoning processes to situations described so as to neutralize cultural or educational differences.

The risk of built-in bias in favor of what is commonly referred to as middle class mores and vocabulary is obvious in such a situation. The startling difference in the pass-fail rate in the two areas previously mentioned, as well as the high over-all failure rate, strongly suggests that the test separates people on some basis other than "ordinary intelligence." One can well imagine how different the results might have been if half of the vocabulary questions were related to "soul" food, people and music and other terms commonly spoken in West Oakland but almost unheard and unread in Montclair.

It should be noted that the test is not a standardized test and has not been validated by comparison with standard

intelligence tests administered to any sampling of the same groups of people; and, obviously, evaluating the comparative performance as jurors of those who passed and those who failed is a practical impossibility.

A psychologist with long experience in constructing and evaluating tests for different purposes testified that the test in question has the appearance of being an intelligence test but contains some items which reflect the cultural bias of the author. He also testified that at least fifty items would be needed in a well-constructed intelligence test to take into account the sub-cultures of a heterogeneous population.

Furthermore, he expressed the opinion that ten minutes is too short a time to allow for this test, that it is not good test procedure to withhold the time limit from those taking the test, and that irrespective of time, 84% is too high a cutting point for a passing grade.

He also expressed the opinion that the test has a tendency to exclude people from the ghettoes because of "inadvertent discrimination"—that is, unintended discrimination resulting from cultural factors.

In terms of the results, he also expressed the opinion that the failure rate in both of the comparison areas was much too high and indicated that a substantial number of people who possessed "ordinary intelligence" were being eliminated in both areas.

The realities of our society emphasize the importance of jury panels drawn from a representative cross-section of the community. We have significant cultural differences almost unknown in our county thirty years ago. Litigants and witnesses come into Court from all walks of life in a highly varied community. Unless jury panels represent the same walks of life and the same pattern of cultural differences, they will be less likely to understand fully the implications of the testimony they hear and the situations

they must evaluate, and less likely to bring into their deliberations the background of experience and wisdom required for a just result. Similarly, the narrower the cultural spectrum of our jury panels, the less confidence the underrepresented groups will have in the courts as temples of justice.

The general term, "ordinary intelligence," must be interpreted and applied in this context. The Court cannot conclude that 81.5% *of the registered voters* in a large section of Oakland are below the level of "ordinary intelligence".

Accordingly, the challenge to the panel must be sustained.

In ordering a new panel for this case, the Court must consider whether the limitation of the jury panel to registered voters is itself too narrow. Unquestionably, some adults otherwise qualified for jury service fail to register. However, the percentage is probably small in Alameda County, since intensive voter registration drives take place before each state and national election and no group is discouraged from registering or voting.

This same question was considered by the House Judiciary Committee in its report on S.B. 989, subsequently enacted on March 27, 1968, as the "Jury Selection and Service Act of 1968" (28 U.S.C. 1861, *et seq.*) That act requires juries in federal courts to be chosen from a "random selection of a fair cross section of the persons residing in the community . . . wherein the court convenes." (Sec. 1863(b)(3).) It provides for the use of voter lists as the basic source of juror names, to be supplemented by other sources where necessary to foster the policy of the act. In commenting on this, the House Judiciary Committee report stated (p. 5):

> "The voting list need not perfectly mirror the percentage structure of the community."

• • •

"In a sense the use of voter lists as the basic source of juror names discriminate against those who have the requisite qualifications for jury service but who do not register to vote. This is not unfair, however, because anyone with minimal qualifications—qualifications that are relevant to jury service—can cause his name to be placed on the lists simply by registering or voting. No economic or social characteristics prevent one who wants to be considered for jury service from having his name placed in the pool from which jurors are selected."

The Federal Act declares that sufficient proficiency in the English language is shown by anyone who satisfactorily fills out a juror qualification form quite similar in context to the affidavit required in this County.

It is unnecessary to consider the question of whether the Jury Commissioner's instructions for granting excuses under C.C.P. 201 must be in writing. It may be noted, however, that the detailed analysis of the Montclair and West Oakland areas clearly indicates the absence of any disproportionate elimination of jurors in the granting of such excuses.

The Jury Commissioner is directed to summon a panel of jurors for the trial of this case selected in a manner consistent with this decision. In order to allow sufficient time for this, the trial of the case in continued to Monday, April 29, at 10:00 a.m.

Dated: April 18, 1968.

/s/ SPURGEON AVAKIAN
Spurgeon Avakian
Judge of the Superior Court

Appendix F

Directions: Please answer the following questions by putting a circle around the number in front of the *best possible* answer. *Work rapidly.* If you do not know the answer, guess, and go on to the next question.

1. 423768323932
   In this number, how many 3's are immediately followed by a 2?

1. one
2. two
3. three
4. four

2. The exact opposite of "*never*" is:

1. often
2. frequently
3. always

3. 5:00 p.m. is a rush hour on busses, because

1. Working people are going home at that hour.
2. So many people live in the country.
3. Busses are the best cheap means of transportation.

4. Why is a man superior to a productive machine?

1. A man has a sense of humor.
2. A man can think.
3. A machine requires repairs.

5. The opposite of "*thrifty*" is:

1. Stubborn
2. Wasteful
3. Stingy.

6. Which of the following is a trait of character?

1. Generosity
2. Health
3. Personality

7. The statement that the moon is made up of green cheese is:

1. Absurd
2. Misleading
3. Wicked

8. Why was Civil Service established?

1. As a sound political move.
2. To provide qualified workers for government jobs.
3. To increase the number of government bureaus.

9. If you were asked what you thought of a person whom you didn't know, you should say:

1. I will go and get acquainted.
2. I think he is all right.
3. I don't know him and can't say.

10. The government of the United States is sound, because:

1. It follows the will of the majority.
2. It does not allow representative government.
3. It permits the development of dictators.

11. The most desirable quality of a juror is:

1. Ambition.
2. Kindly attitude.
3. Logical thinking.

12. A man is judged by what he does rather than by what he says, because:

1. What a man does shows what he really is.
2. It is wrong to tell a lie.
3. A deaf man cannot hear what is said.

13. Why do inventors patent their inventions?

1. It gives them control of their invention.
2. It creates a greater demand.
3. It is the custom to get patents.

14. A man's influence in a community *should* depend upon his:

1. Wealth
2. Character
3. Ambition

15. Of the five acts below, four are alike in a certain way. Which is the one *not* like these four?

1. smuggle
2. steal
3. bribe
4. cheat
5. sell

16. The purpose of administering the oath to a witness is:

1. To check his background.
2. A means taken by law to obtain true testimony.
3. To see if a person believes in God.

17. Short men can be admitted to the army, because:

1. They want to enlist.
2. They are more intelligent than tall men.
3. Usefulness does not depend on height.

18. What people *say* about a person makes up his:

1. Reputation
2. Personality
3. Disposition

19. What is the difference between "*falsehood*" and "*perjury*"?

1. No difference. They are the same.
2. Perjury is a falsehood under oath.
3. Falsehood refers to a misdemeanor; perjury refers to a felony.

20. You should not give money to beggars on the street, because:

1. It makes it hard for the beggars to get work.
2. It encourages living off of others.
3. It takes away the work of organized charities.

21. *Bank checks* are used to a great extent in business, because:

1. You can have all the money you need by writing checks.
2. Checks are safer and more convenient.
3. Checks are cleaner than bills.

22. The opposite of "*hope*" is:

1. despair
2. hate
3. misery

23. If a person asks you for something you do not have, you should:

1. Tell him to mind his own business.
2. Say you don't have it.
3. Walk away.

24. If a dispute is *settled by agreement*, it is called a:

1. Bond
2. Compromise
3. Argument

25. If it rains when you are starting to go for the doctor, should you:

1. Stay at home.
2. Take an umbrella.
3. Wait until it stops raining.

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OCT 5 1972

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1602

WALTER E. CRAVEN, Warden California State Prison at Folsom,

Respondent,

vs.

RICHARD L. CARMICAL,

Petitioner.

Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari

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PRELIMINARY STATEMENT

Respondent's Brief in Opposition to the Petition for Writ of Certiorari, in addition to presenting argument on the issues raised in the petition sets forth in an "Introduction" arguments which he asserts militate against granting the petition. We respond first to the contentions raised in this introduction, and then to the arguments made.

I

REVIEW BY CERTIORARI IS APPROPRIATE AT THIS TIME

Respondent advances three points alleged to militate against the granting of the petition: 1) that the case was remanded for a hearing to prove or disprove the facts alleged; 2) that the "clear thinking" test at issue is no longer in use in Alameda County and accordingly does not present an important problem in the administration of

justice; and 3) that the state's claim as to the impact of the decision is wholly speculative. We disagree with respondent's characterization of the case and submit that review at this time will prevent the development of significant problems in the administration of justice and the needless waste of time in the increasingly crowded state and federal courts.

It is of course true that the facts as developed at a hearing in the District Court on remand may prove to be different than those alleged in the petition. However, if, as the District Court found and as petitioner has urged in this Court, the facts alleged in the petition do not demonstrate that the jury panel was unconstitutionally selected, return of this case for an evidentiary hearing would result in a totally unwarranted waste of limited judicial resources. Moreover, if the facts developed at a hearing do in fact disprove the allegations of the petition, the states comprising the Ninth Circuit are left with a decision which establishes what is in our view a totally erroneous statement of the law and its application to the jury selection process, or at least, with conflicting statements of the applicable standard. Compare *Lattimore v. Craven,* 453 F.2d 1249, 1251 (9th Cir. 1972).

Respondent has claimed that the case has no significance because the test at issue was discontinued in 1968, and the state's claim of retrials in the hundreds is speculative. We submit that the potential impact of this interpretation of the criteria for jury selection is enormous because it may require not only retrials in Alameda County, but is totally retroactive and applicable throughout the Ninth Circuit. We do not know how many counties in California or states in the Ninth Circuit utilize "intelligence" tests. However, challenges to such tests on the basis of disproportionate

representation have been made in Los Angeles County, the most populous in California, and in Sacramento County.[1]

Finally, the case in its present posture raises a significant issue of deliberate by-pass—the extent to which federal courts should inquire into the motives and knowledge of counsel years after the event where there is no question of the fairness of the trial or the justice of the result.

We submit that this case raises issues of significance which should be determined by this Court at this time, and that further proceedings in this case, and in the others which will inevitably be filed should certiorari be denied, will unnecessarily burden both state and federal judicial systems.

II

THE QUESTION OF WHEN DELIBERATE BY-PASS OF A VALID STATE PROCEDURAL RULE PRECLUDES HABEAS CORPUS RELIEF IS AN IMPORTANT ONE WHICH SHOULD BE CONSIDERED AND DECIDED BY THIS COURT

In his state court trial, respondent Carmical raised no question concerning the racial composition of the jury panel from which the jury which tried him was selected. For the reasons stated in our petition, we take the position that Carmical's failure to challenge the panel before trial in accordance with state procedure precludes granting relief on federal habeas corpus, without further inquiry into counsel's or respondent's reasons, at least in cases where there is no credible claim of incompetence of counsel.

Respondent in opposing the petition for writ of certiorari on this question asserts that the decision below was correct because the state did not "fulfill its burden of demonstrat-

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1. *See, Donaldson v. California*, 404 U.S. 968 (1971); *People v. Jones*, 25 Cal.App.3d 776, 102 Cal.Rptr. 277 (1972); *People v. Sylvester*, 3 Crim. 6488 (Sacramento).

ing an affirmative, intelligent waiver of known constitutional rights . . . ." citing *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Fay v. Noia*, 372 U.S. 391 (1963), and two recent cases decided by this Court: *Humphrey v. Cady*, 405 U.S. 504 (1972); *Peters v. Kiff*, 33 L.Ed.2d 83 (1972). (Brief at 7-8.)

In *Humphrey v. Cady*, the defendant had raised constitutional questions concerning the Sex Crimes Act in the state court proceedings, but the defendant's counsel failed to file a brief on the questions as requested by the trial judge. When counsel failed to act, the court concluded that the state petition was sufficient to support the order continuing confinement. No appeal was taken from the order. The District Court concluded that the failure of counsel to file a brief amounted to a deliberate strategic decision to abandon the constitutional claims and barred federal relief. On these facts, this Court held that a hearing was necessary to determine the reason for counsel's failure to file a brief and the extent of the defendant's participation. This Court noted that a defendant is not necessarily bound by counsel's decision.

We submit that in the instant case different circumstances require a different result, and that despite the use of the "knowing and intelligent waiver" standard in *Humphrey*, failure properly to challenge a jury should preclude federal habeas corpus relief without further inquiry as to the reasons.

This Court's use of the "knowing and intelligent waiver" standard in *Humphrey* cannot logically or even usefully be extended to all trial decisions which involve constitutional rights;[2] both the burden on the courts and the

2. Inquiry into motivation must end somewhere. *Cf., McMann v. Richardson*, 397 U.S. 759, 768-69 (1970). In *McMann*, this Court held that a counseled defendant was not entitled to a hearing on his allegation that his plea of guilty was motivated by a coerced

potential for disrupting the administration of justice are too great. Are we, for instance, to have a federal judicial inquiry into the motives and knowledge of counsel who fail to cross-examine a witness or who do not call a possible witness? Are we to conduct, years later, a federal court hearing to determine whether a defendant made a "knowing and intelligent waiver" of his right to testify or his right not to testify?

Respondent points out that in *Peters v. Kiff, supra,* this Court upheld a habeas petitioner's claim of systematic racial exclusion even though the claim was not raised at trial. We note that the opinions constituting a majority in that case did not discuss the issue of deliberate by-pass, so apparently it was not raised as an issue in the case. It was pointed out in the dissenting opinion, however, that *Hill v. Texas,* 316 U.S. 400 (1942) on which Mr. Justice White's concurring opinion relied, was expressly limited to cases where timely objection had been made. 33 L.Ed.2d at 99 (fn). Since the question was not ruled on, the case does not preclude consideration of the question here. Moreover, in *Peters,* the Court was establishing a new rule of standing which at least provided a reason for reaching the issue despite the doctrine of deliberate by-pass. In the instant case, respondent insists that the rule applied by the Court of Appeal is not a new rule; thus, there is no reason for setting aside valid state procedural rules.[3]

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confession. This Court considered his plea a "plain by-pass" of state remedies in regard to testing the confession and commented that whether it was intelligent depended on whether he was so incompetently advised by his counsel he should be afforded another chance. There has been no claim of incompetent counsel here.

3. It is our position that the Court of Appeal incorrectly interpreted the existing law while purporting to follow it, thus, in effect establishing a new rule. If this Court does establish a different standard, it should be prospective only, in accordance with *Peters.*

As pointed out in our petition, no legitimate interest of a criminal defendant is protected by permitting collateral attack on federal habeas corpus where he has failed to raise the issue at the proper point in the trial process. The state, however, has a compelling interest in the finality of trials which have been fairly conducted with a jury satisfactory at the time. We submit that the reasons which dictate the use of the "knowing and intelligent waiver" standard in appropriate cases do not apply here and no legitimate interest of the defendant is protected by applying it.

III

THE DECISION BELOW INCORRECTLY APPLIED THE STANDARDS ESTABLISHED BY THIS COURT

Respondent urges that the decision below is not in conflict with decisions of this Court and that the state's position that the case improperly applied decisions of this Court is based on a semantic quibble over the word "objective" (Brief at 9-10).

The state does not contest the proposition that the statistics presented by Carmical below were sufficient to make out a prima facie case of jury discrimination based on the cases decided by this Court.[4] However, these statistics were not the only information presented to the court. The petition showed that the disproportion was due to an objective test of 25 questions which was given to all prospective jurors. While respondent's brief states that "the test was culturally biased so that blacks would fail it in greater

4. We note, however, that the "statistics" presented to the District Court and to this Court (Brief at 5) also showed that of 47 jurors chosen from the two selected districts in 1966, the year of Carmical's trial, 6 were Negroes, a percentage of 12.8. As of 1968, Negroes constituted 12.4 of the county population. *See, People v. Newton*, 8 Cal.App.3d 359, 389, 87 Cal.Rptr. 394, 414 (1970).

proportions than whites" (Brief at 11), this is not supported by any allegation in the petition. In his testimony and affidavit, the psychologist concluded that the test must measure something other than average intelligence because it was difficult to come to the conclusion that such a high percentage of non-whites were below average. The possible reason given was that some questions (20, 21 and 25) had a "cultural bias" and could account for the difference. It was the opinion of the psychologist that the test was made up without considering cultural differences. Thus, there is nothing to support the statement that the test was biased "so that" blacks would fail it. The test was before the courts below and is before this Court. It is obviously racially neutral. Even if it is "culturally biased," whatever that may mean, that does not make it unconstitutional. Any jury panel must deal with problems and issues couched in the language and values of the prevailing culture. There is no constitutional requirement that tests to screen jurors must be so phrased that proportional percentages of various groups are chosen. Indeed, this Court has held directly to the contrary. *See, Fay v. New York,* 332 U.S. 261 (1947). We also note that respondent's and the psychologist's other criticisms of the test—that it was too short, that the passing grade was too high, and that a time notice should have been given—apply equally to everyone taking the test. While these factors may have made the selection process imperfect, again, it was completely "racially neutral."

Respondent urges that the decision below

> "comes squarely within the rationale of *Griggs v. Duke Power Company,* 401 U.S. 424 (1971), and *Gaston County v. United States,* 395 U.S. 285 (1969), holding invalid tests or other selection methods that serve no valid purpose and that have a racially discriminatory impact, regardless of the intent behind their use." (Brief at 11.)

He then urges that the test for jury discrimination should be no less stringent than for job discrimination, citing, to buttress this conclusion, *Jefferson v. Hackney*, 32 L.Ed. 285 (1972). Neither *Griggs* nor *Gaston* applies to this case, and *Jefferson* provides support for the state's position herein.

In *Griggs*, this Court indicated that it granted review

> "to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites."

Section 703(a) of the Civil Rights Act provides *inter alia* that it shall be an unlawful practice for an employer to classify his employees in ways to adversely affect his status because of his race, color, religion, sex or national origin. Section 703(h) provides that is is not unlawful to give or act on the results of a professionally developed ability test provided the test "is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The Court in *Griggs* was concerned solely with interpreting the meaning of the Act. The Court noted that the objective of Congress was to achieve equality of job opportunities and remove past barriers:

> "Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices . . . . What is required by Congress is the removal of arti-

> ficial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification . . . . The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is 'prohibited.' *Id.* at 4319.

The Court then went on to discuss the meaning of section 703(h) authorizing test not "designed, intended or *used* to discriminate . . ." (Emphasis added by Court). The Court noted that the Equal Employment Opportunity Commission, with enforcement responsibility, had issued guidelines interpreting this section to permit only the use of job related tests. The Court then reviewed the legislative history of the Act and concluded that the guidelines expressed the will of Congress. *Id.* at 4320-21.

Thus, the decision is based entirely on statutory construction and not on constitutional requirements. We submit that such a decision interpreting a statute and related to the entirely different problems of employment is entirely inapplicable to the instant case. There is no constitutional violation in a jury selection process unless intentional discrimination on grounds of race is shown. The *Griggs* case does not change in any way the position of the Court expressed in *Carter v. Jury Commission,* 396 U.S. 320 (1970) and *Turner v. Fouche,* 396 U.S. 346 (1970).

Gaston involved the interpretation of the Voting Rights Act of 1965 which suspended the use of any test or device as a prerequisite to registering to vote in a jurisdiction in which less than 50% of the voters were registered. The burden was on the jurisdiction to rebut the presumption of

discrimination. The court concluded that it was appropriate to consider whether a test had the effect of denying the right to vote because the jurisdiction had maintained separate and inferior schools.

Respondent cites *Jefferson* in support of his argument on the basis that this Court distinguished *Griggs* not on grounds of statutory interpretation but on grounds that the *Griggs* test had no legitimate purpose while the Texas statute in *Jefferson* served a reasonable supportable purpose of the state. Thus, his argument continues, the present case is within *Griggs* because the clear-thinking test served no legitimate function (brief at 11, note 8). Respondent not only misapprehends *Jefferson,* but misstates the "facts" in the instant case.

First, there is nothing in the record before this Court to establish by allegation or otherwise that the test in question served "no legitimate function whatever." The function of the test was to select jurors of ordinary intelligence pursuant to California statutes. That it did this less than perfectly does not make it constitutionally deficient. Second, in *Jefferson,* this Court declined to find invidious discrimination in the unequal reduction of benefits among AID classes merely because there was a larger percentage of Negroes and Mexican Americans in the class with the greatest reduction, where there was no intent to discriminate in establishing the reductions. While *Jefferson* involved the distribution of benefits and the interpretation of the Social Security Act and thus had no necessary applicability to the jury discrimination problem, it does stand for the proposition that disparity in racial percentages absent a showing of intentional discrimination does not constitute a violation of equal protection.

We submit that the use of the test at issue here, even if it was imperfect, did not violate constitutional standards

and that the decision of the court below was clearly erroneous and in conflict with decisions of this Court.

CONCLUSION

For the above reasons, we respectfully submit that the petition for Writ of Certiorari be granted.

Dated: October 4, 1972

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